

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

May 17, 1999

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

CECIL KILMER FLAGSTONE

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Docket No. PENN 99-16-M  
A.C. No. 36-08739-05502 9BK

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

## ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 25, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cecil Kilmer Flagstone ("Kilmer") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on November 19, 1998, or the judge's Order to Respondent to Show Cause issued on January 14, 1999. The judge assessed the civil penalty of \$1,200 proposed by the Secretary.

On April 29, 1999, the Commission received a letter from Kilmer asserting that, on December 15, 1998, it had sent a letter answering the Secretary's petition for assessment of penalty. Mot. at 1. The December 15 letter, which Kilmer enclosed along with its motion, was addressed and sent to the Department of Labor's Regional Solicitor's Office in Geneva, New York. The December 15 letter also admits the two alleged violations of mandatory safety standards, but contests the amount of the penalty proposed.

The judge's jurisdiction in this matter terminated when his decision was issued on February 25, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). The Commission received Kilmer's letter on April 29, 1999, after the judge's default order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply “so far as practicable” in the absence of applicable Commission rules). On the basis of the present record, we are unable to evaluate the merits of Kilmer’s position. In the interest of justice, we reopen the proceeding, treat Kilmer’s letter as a late-filed petition for discretionary review requesting relief from a final Commission decision, and excuse its late filing. *See F. W. Contractors*, 17 FMSHRC at 248. We remand this matter to the judge, who shall determine whether final relief from default is warranted. *See id.*

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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